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No._____

IN THE

Supreme Court of the United States

October Term, 1982

DIANE TISCHENDORF, now DIANE MONTGOMERY,
Petitioner,

vs.

PETER TISCHENDORF,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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QUESTION PRESENTED

Did the Minnesota Supreme Court err when it held that a nine and one-half year old citizen does not have the constitutional right to remain within the territorial boundaries of this country even though it was found that the child was bright, articulate and had a genuine fear of being detained in a foreign country.

LIST OF PARTIES IN PROCEEDING BELOW

Diane Montgomery, formerly Diane Tischendorf, was an Appellant and Peter Tischendorf was the Respondent in the proceeding before the Minnesota Supreme Court. William J. Hempel, an Appellant in the proceeding below, is not seeking review of the decision denying him an appointment as guardian ad litem of the minor.

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PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

Petitioner, Diane Tischendorf, now Diane Montgomery, respectfully petitions this Court for a writ of certiorari to review an order of the Minnesota Supreme Court entered in this case on July 9, 1982.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court (App. A, infra, A-1) is reported at 321 N.W.2d 405 (Minn. 1982).

The orders of the Honorable Joseph P. Summers, Judge of the Ramsey County District Court, dated July 25, 1980 (App. B, infra, A-22), June 13, 1980 (App. C, infra A-26) and May 3, 1979 (App. D, infra, A-28) are presently unreported.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on July 9, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, provides in relevant part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises from the attempt by Peter Tischendorf, a citizen of West Germany, to force his then nine and one-half year son Thomas, a United States citizen and resident of Minnesota, to leave the United States for a visitation in West Germany. The Ramsey County District Court, St. Paul, Minnesota, had granted Diane Montgomery, formerly Diane Tischendorf, the child's mother, a default dissolution from Tischendorf on May 17, 1977. The court awarded her permanent and exclusive custody of the child and issued a restraining order against Tischendorf after he had threatened to take the child and keep him in Germany. Tischendorf obtained a default dissolution judgment in West Germany.

In March 1979, Tischendorf moved to modify the original Ramsey County divorce decree, chiefly requesting visitation privileges with the child in both Minnesota and West Germany. A hearing was held on May 3, 1979 before Judge Joseph Summers, who granted Tischendorf broad rights to visit with Thomas in the United States and in West Germany each summer.

Two brief visitation experiences in Minnesota between Tischendorf and the child occurred between May 1979 and May 1980. These brief contacts between father and son produced anxiety, fear and hostility in the child. The child has stated on numerous occasions, including twice under oath before Judge Summers and Montgomery's attorney, that he does not wish to leave the United States. Thomas fears he will be detained when once abroad.

In May, 1980 Tischendorf requested visitation with his son in West Germany for the following August. Judge Summers issued a *sua sponte* order on June 13, 1980 requiring Montgomery to "turn over" Thomas on August 1, 1980 for transportation to West Germany. Montgomery, fearing that her son would not be allowed to return to the United States, then moved the trial court to deny the proposed visitation in West Germany until, among other things, Thomas agreed to go. On July 23, 1980, William J. Hempel applied to be appointed guardian ad litem for Thomas and moved to intervene.

The court denied the motions of Montgomery and Hempel on July 25, 1980. In the order denying Montgomery's motion Judge Summers explicitly directed her to prepare Thomas for a three-week stay in Germany beginning 12:00 noon on August 1, 1980 and provided that a violation of the order would be contempt of court. Both Montgomery and Hempel filed timely

notices of appeal to the Minnesota Supreme Court. On July 27, 1980, the trial court stayed its orders requiring visitation in West Germany upon the filing of a supersedeas bond. The appellants filed the bonds. Following a hearing before six members of the Minnesota Supreme Court on July 31, 1980, Tischendorf's motion to vacate the stay was denied.

On July 9, 1982 the Minnesota Supreme Court affirmed the trial court's decision forcing the child to leave the United States and denying Hempel's application for appointment as a guardian ad litem. It ruled that a child does not have an independent constitutional right to remain in the United States if a court determines that it is in the best interests of the child to leave the country. Although the court required certain conditions purporting to assure Thomas that he would be returned to the United States, the danger remains that if he is forced to leave he will not be able to return to this country.

The constitutional issues sought to be reviewed were first heard before Judge Joseph P. Summers of the Ramsey County District Court July 14 and July 24, 1980 on the Notice of Motion, Motion and Memorandum in Support of Motion of Montgomery dated July 8, 1980. (App. E, infra, A-31). In his July 25, 1980 order, Judge Summers made no ruling on the constitutional issues. These issues were again fully briefed and argued before the Minnesota Supreme Court. The Minnesota Court ruled that the constitutional issues had been validly raised in the District Court. *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 410 (Mn. 1982); A-1.

REASONS FOR GRANTING THE PETITION

1. When A Citizen Is Forced To Leave The United States He Loses All Protection Of The Constitution And Laws Of The United States.

The increased number of marriages between spouses of different nationalities has spawned new issues regarding the custody of children following divorce. These issues are of worldwide concern. Affidavit of Brigette M. Bodenheimer, A-50. The absence of applicable international agreements on family law issues only exacerbates these problems.

Most countries protect their citizens who detain or abduct their children who live in foreign countries. It is difficult to obtain the return of an American child from a foreign country when he is held there by a foreign parent. That parent's own national laws often honor the detention, effectively disregarding prior American custody awards to the other parent.

The full extent and range of the international problems involved in this case are revealed by the experience of the Office of Citizens Consular Service of the Department of State. Letter of J. Brian Atwood, Assistant Secretary for Congressional Relations, to former Vice President Walter F. Mondale, A-56. The Assistant Secretary reported that about 300 cases were then pending in the Department involving American children taken to or detained in foreign countries by non-custodial parents. He stated that United States consular officers have no legal authority to obtain physical custody of children and return them to the United States. They cannot offer legal advice, represent U.S. citizens in custody hearings before foreign courts, or attempt to influence the outcome of those hearings. Many of these children are lost to their American parents and deprived of all contact with their homeland.

The Hague Conference on Private International Law recognized the seriousness of this problem in 1976. For this reason, it placed the subject of international child abductions, including child retentions after visitations, on its working agenda for 1976-1980. The Conference has drafted a Convention under which signatory governments would assure the return of wrongfully removed or retained children to the country of origin and to the rightful custodian. It will take a long time, perhaps years, before it will go into effect between the various countries involved. The United States has not ratified the Convention. There are also no treaties between the United States and most other nations, including West Germany, which resolve these issues.

When a minor citizen is forced by a state court to leave the territorial limits of the United States he loses all protection of our Constitution. If the child's noncustodial parent takes the child abroad and refuses to let the child return to the United States, the foreign parent's action, while illegal under American law, will most likely be honored by the foreign country. The child then becomes subject to the laws of that country, effectively losing the protection of the United States Constitution.[1]

The Constitution grants certain rights to all United States citizens. It guarantees a recognized bundle of rights to citizens who are adults and also guarantees a certain bundle of rights to citizens who are minors. While it may be proper to give to a minor a smaller bundle of rights, *Bellotti v. Baird*, 443 U.S.

[1] It should be noted that Montgomery provided credible evidence to the lower courts delineating both Tischendorf's intention to detain Thomas in West Germany and the difficulties she would encounter in obtaining the return of the child. Indeed, under German law, Tischendorf is entitled to legal custody of Thomas even though a conflicting American custody decree exists. *See, Tischendorf v. Tischendorf*, 405 N.W.2d 405, 413-416 (Yetka, Wahl, JJ., dissenting opinions); A-15.

622, reh. denied, 444 U.S. 887 (1979), a court must not be permitted to take away the child's bundle altogether and leave him without any protection under the Constitution.

The *Tischendorf* court has risked the loss of all of Thomas' constitutional rights by forcing the child to leave the United States for a visitation. The crucial error in its reasoning is its failure to distinguish between judicial actions which, on the one hand, decide whether the child receives the larger or smaller bundle of rights and, on the other hand, those actions which take even the smaller bundle away from the child altogether.

The court held that Thomas' entitlement to his constitutional rights hung on whether he could exercise those rights intelligently. Thomas is not asserting that he has the right to choose between the larger adult bundle of rights and the smaller bundle for children. Nor is the issue whether Thomas has a right to choose when, where, or whether he should have visitation with his noncustodial father. Instead, the issue is whether the court may jeopardize the entire bundle of children's rights, and, hence, risk loss of all his rights by forcing him to leave the United States.[2]

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[2] The Petitioner is not asking the Court to decide that all minors, no matter how young, have the right not to be forced to leave this country. However, there is undisputed evidence in the record below demonstrating that Thomas clearly understands the serious implications of leaving this country. The trial court below found that "Thomas' real fear is not of *visiting* Germany but of being *detained* in Germany. This is a genuine fear and the court is concerned about it. . .", Order and Memorandum, Judge Joseph P. Summers, July 28, 1980, A-28. The Minnesota Supreme Court not only directly quoted this finding in its opinion, 321 N.W.2d 405, 412, A-13, but also recognized that the child is "bright and articulate", 321 N.W.2d 405, 407, A-15. In the face of this evidence, the court in *Tischendorf* nevertheless held that Thomas did not have a constitutional right not to be forced to leave the country because he lacked the intelligence to exercise it. In effect, the court has held that no nine and one-half year old minor under any circumstances can exercise such a constitutional right. This ruling is contrary to law.

The lower courts have confused this issue. In *Bergstrom v. Bergstrom*, 296 N.W.2d 490 (N.D. 1980), the court ruled only that a child's preference should be considered in determining the best interests of the child. The court in *Schleiffer v. Meyers*, 644 F.2d 656 (7th Cir. 1981), cert. denied, 454 U.S. 823 (1981), treated the constitutional issue as merely a "factor" in the family relationship. And in *Zaubi v. Hoejme*, 530 F.Supp. 831 (W.D. Pa. 1980), the court suggested that any constitutional right of the child should be subverted to a decision of the "best interests" of the child and abstained from deciding the constitutional issue.

The issue is ripe for decision by the United States Supreme Court. There is a pressing need for a clear determination to clarify the confusion in the lower courts. The courts should not, under the guise of a best interests analysis, no matter how well intentioned, render decisions which erode childrens' rights and deprive them of their basic opportunity to be reared under the protection and privileges of the Constitution and laws of the United States.

2. The Minnesota Supreme Court's Decision Forcing A Child Citizen To Leave The United States Contravenes The Intent Of Prior Rulings Of This Court.

Thomas, a citizen of the United States, has unequivocally expressed his desire to remain in this country. An elemental right of any citizen is the right to remain here to enjoy the rights, privileges and immunities guaranteed by the Fourteenth Amendment of the Constitution. Loss of that right—expatriation—can only take place at the initiative of the citizen, not the government. Compelling travel to a foreign country also infringes upon the federal right to travel. Although a minor, Thomas enjoys those same federal constitutional rights.

A. A Citizen of the United States has the Right to Remain in this Country.

The jurisprudence of this country contains few instances paralleling the compelled deportation of a United States citizen. Where loss of citizenship has been threatened the courts have recognized the value of citizenship and afforded it protection. *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Vance v. Terrazas*, 444 U.S. 252, reh. denied, 445 U.S. 920 (1980). Once Congress acts to grant citizenship, it has no power to take it away. As the *Vance* court stated, "in the last analysis, expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct." *Id.* 260. Absent an intent on the part of the citizen to terminate that status, it may not be lost or taken away by the government.

This Court has recognized that the forced departure from this country deprives the citizen of protection of the Constitution. In *Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922), Mr. Justice Brandeis wrote,

> To deport one who so claims to be a citizen, obviously deprives him of liberty. It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.

The Constitution guarantees that citizens may reside wherever they wish, whether abroad or in any state. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right of interstate travel); *Schneider v. Rusk*, 377 U.S. 163 (1964) (naturalized citizen's

right to live abroad without losing citizenship); *Kent v. Dulles*, 357 U.S. 116 (1958) (right to obtain passport). This Court in *Kent* described this right "as part of the 'liberty' of which the citizen cannot be deprived without due process of law." *Id.* at 125.

A citizen may also choose not to travel to another country. The decision to remain here is "as close to the heart of the individual as the choice of what he eats, or wears, or reads." *Id.* at 126. Indeed, the "only absolute and unqualified right of citizenship is to residence within the territorial boundaries of the United States." *United States v. Valentine*, 288 F.Supp. 957, 980 (D.P.R. 1968). *See also, Worthy v. United States*, 328 F.2d 386 (5th Cir. 1964), which held unconstitutional a statute penalizing a citizen for entering the United States without a valid passport.

If a citizen is compelled to travel to another country, he must, as a physical necessity, lose any ability to exercise his right to travel elsewhere. Compelled travel not only infringes the right to travel, but by removing the citizen from the United States it deprives him of other federal rights guaranteed by the Fourteenth Amendment. Such a deprivation can occur only upon a showing of "the gravest imminent danger to the public safety." *Korematsu v. United States*, 323 U.S. 214, 218 (1944), reh. denied, 324 U.S. 885 (1945).

B. The Right to Remain in the United States Extends to Minors.

This Court has been reluctant to define "the totality of the relationship of the juvenile and the state." *In Re Gault*, 387 U.S. 1 (1967). It has, however, long recognized that children, like adults, possess constitutional rights. These rights do not mature and come into being magically only when one attains

the state-defined age of majority. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). Indeed, the rights of children have resulted in watershed constitutional decisions. *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954).

In many contexts, this Court has held that children may not be deprived of their federal constitutional rights. *See, e.g., Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (wearing armbands in school to protest Vietnam war); *School District v. Schempp*, 374 U.S. 203 (1963) (compelled prayer in schools); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (decision of minor to have an abortion); *Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment of school children); *Goss v. Lopez*, 419 U.S. 565 (1975) (suspension from school); *Carey v. Population Services International*, 431 U.S. 678 (1977) (right to obtain contraceptives); *Parham v. J.R.*, 442 U.S. 584 (1979) (commitment to state mental institution by parents).

Thomas' minority does not impact his constitutional rights. As Justice Brennan wrote in *Carey v. Population Services International*, 431 U.S. 678, 692 (1977), "[M]inors are entitled to constitutional protection for freedom of speech, equal protection against racial discrimination, due process in civil contexts and a variety of rights of defendants in criminal proceedings . . . (citations omitted)." Although the Court has not yet articulated a precise test to differentiate the rights of juveniles from adults, it is clear both enjoy the protection of the Constitution.

Courts have protected children from the forced removal from this country. *Acosta v. Gaffney*, 558 F.2d 1153 (3d Cir. 1977); *Lopez v. Franklin*, 427 F.Supp. 345 (E.D. Mich. 1977);

and *Bergstrom v. Bergstrom*, 478 F.Supp. 434 (D.N.D. 1979), vacated on jurisdictional grounds, 623 F.2d 517 (8th Cir. 1980), all recognized that a child citizen has a federal constitutional right to remain in the United States. In *Acosta* and *Lopez* adult aliens had given birth to a minor child while they were illegally present in the United States. Subsequently, the Immigration and Naturalization Service ordered the parents deported. Although no deportation orders were issued against the minor citizens, it was argued that deportation of their parents would result in a *de facto* deportation of the minor citizens.

The *Acosta* court, discussing the constitutional rights of child citizens, stated:

> The constitutional right upon which Lina relies is somewhat broader than she describes it. It is the fundamental right of an American citizen to reside wherever he wishes whether in the United States or abroad, and to engage in the consequent travel. *See Schneider v. Rusk*, 377 U.S. 163, 168, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1964); *Kent v. Dulles*, 357 U.S. 116, 125, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958). It is the right to exercise a choice of residence, not an obligation to remain in one's native country whether one so desires or not, as is required in some totalitarian countries. In the case of an infant below the age of discretion the right is purely theoretical, however, since the infant is incapable of exercising it . . .

558 F.2d at 1157-58.

The orders deporting the parents were upheld in both cases. Both courts relied on the extreme youth of the children. The *Lopez* court further explained that the government had not forced the minor children to leave. Instead, the parents chose

not to stay in the United States, thereby forcing the children to leave as well. 427 F.Supp. at 349.

By contrast, in *Bergstrom* the court found that the minor citizen, then eight years of age, had sufficient discretion and intelligence to make a reasoned choice whether to leave the United States in order to reside with her mother in Norway. The mother, a resident of Norway, was entitled to custody of the child under a divorce decree. The child commenced an action in United States District Court asking that her mother be restrained from carrying out the requirement of the decree that she be returned to Norway. The court granted the requested relief, holding:

> The central privilege of America [sic] citizenship is the right to live in the United States as long as one sees fit. . . .
>
> This Court has been shown no laws, statutes or holdings which would authorize a court of domestic relations to remove a minor American citizen from the protection of the Constitution and laws of the United States against her will.

478 F.Supp. at 440. The Eighth Circuit Court of Appeals vacated the trial court order on jurisdictional grounds without reaching the merits, noting that after the district court's injunction the entire matter had been litigated in the North Dakota state district court and that an appeal was pending in the North Dakota Supreme Court.

The right to remain in the United States is fundamental. The decision to do so is momentous. Its very importance therefore demands that the courts apply the same standards to an adult and a minor citizen. The *Tischendorf* court has not done so. It has held that a child must leave the United

States against his will in the face of evidence that he does not wish to leave and that he will not be allowed to return. Indeed, the court refused even to consider that a child has the right to refuse to leave the United States.

CONCLUSION

For the above reasons this Court should grant Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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